Nos. 93-1361 and 93-1389

FILED
MAR 31 1994
CLERK OF THE COURT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE DREXEL BURNHAM LAMBERT GROUP INC. and REFCO, INC.,

Petitioners,

v.

THE COMMITTEE OF RECEIVERS FOR A.W. GALADARI and THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES,

Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENT THE COMMITTEE OF RECEIVERS FOR A.W. GALADARI

RICHARD W. REINTHALER
(Counsel of Record)
PAUL L. FRIEDMAN
DWIGHT A. HEALY
ANNE D. SMITH
WHITE & CASE
1155 Avenue of the Americas
New York, NY 10036
(212) 819-8200
Attorneys for Respondent The Committee of Receivers for A.W. Galadari

March 31, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether a quasi-judicial agency or instrumentality of a foreign state waived its immunity, either expressly or impliedly, under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611, where it appeared in an action in a representative capacity on behalf of two non-immune defendants, did not affirmatively seek any relief other than comity deference to its own proceedings abroad, and thereafter asserted its FSIA defenses as soon as relief was sought against it and as soon as it was added as a party?

2. Whether the third clause of the commercial activity exception to the Foreign Sovereign Immunities Act by its terms denies an agency or instrumentality of a foreign state immunity from suit in the United States over claims based upon its sovereign acts of adjudicating claims asserted in Dubai where those sovereign acts bore no more than an attenuated connection to alleged commercial activities elsewhere?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. The Appointment And Activities Of The Committee Of Receivers	2
B. The Original Drexel And Refco Actions	4
1. The Drexel Case	4
2. The Refco Case	5
C. Petitioners' Efforts To Lift The Stay	6
D. The Claims Against The Committee	7
E. The Decision Below	9
REASONS FOR DENYING THE PETITIONS	10
I. THE DECISION BELOW DOES NOT RAISE ANY IMPORTANT ISSUES CONCERNING WAIVER UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT.	13
A. The Petitioners Raise Primarily Factual Challenges To The Decision Below.	13
B. The Decision Below Is Consistent With The Statute And The Case Law.	15
C. There Is No Conflict Among The Circuits Requiring This Court's Attention.	17

TABLE OF CONTENTS—Continued

Page

II. THE SECOND CIRCUIT'S DECISION REGARDING THE COMMERCIAL ACTIVITY EXCEPTION OF THE FSIA DOES NOT RAISE ANY IMPORTANT ISSUES REQUIRING REVIEW. 20

A. The Court Below Properly Applied The Statute. 20

B. The Decision Below Does Not Conflict With The Decisions Of Other Circuits. 25

CONCLUSION 26

APPENDIX A 1a

APPENDIX B 4a

TABLE OF AUTHORITIES

CASES Page

Aboujdid v. *Singapore Airlines, Ltd.*, 67 N.Y. 2d 450 (1986) 18
Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) 19
Canadian Overseas Ores Ltd. v. *Compania Del Acero Del Pacifico, S.A.*, 727 F.2d 274 (2d Cir. 1983) 15
Corporacion Venezolana de Fomento v. *Vintero Sales Corp.*, 477 F. Supp. 615 (S.D.N.Y. 1979), *rev'd on other grounds*, 620 F.2d 786 (2d Cir. 1980), *cert. denied*, 469 U.S. 1087 (1984) 18
Drexel Burnham Lambert Group, Inc. v. *Galadari*, 777 F.2d 877 (2d Cir. 1985) 4
Drexel Burnham Lambert, Inc. v. *Galadari*, 135 B.R. 719 (S.D.N.Y. 1991) 6
Drexel Burnham Lambert Group, Inc. v. *Galadari*, 127 B.R. 87 (S.D.N.Y. 1991) 6
Drexel Burnham Lambert Group, Inc. v. *Galadari*, No. 84 Civ. 2602, 1987 WL 6164 (S.D.N.Y. Jan. 29, 1987) 3
Federal Insurance Co. v. *Richard I. Rubin & Co.*, 12 F.3d 1270 (3d Cir. 1993) 25
Foremost-McKesson Inc. v. *Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990), *on remand*, 759 F. Supp. 855 (D.D.C. 1991) 15, 17
Frolova v. *Union of Soviet Socialist Republics*, 761 F.2d 370 (7th Cir. 1985) 15
Joseph v. *Office of the Consulate General of Nigeria*, 830 F.2d 1018 (9th Cir. 1987), *cert. denied*, 485 U.S. 405 (1988) 15
Marlowe v. *Argentine Naval Com.*, 604 F. Supp. 703 (D.D.C. 1985) 19
Ohntrup v. *Firearms Center, Inc.*, 516 F. Supp. 1281 (E.D. Pa. 1981), *aff'd*, 760 F.2d 259 (3d Cir. 1985) 19
Pilgrim Badge & Label Corp. v. *Barrios*, 857 F.2d 1 (1st Cir. 1988) 19
Refco, Inc. v. *Galadari*, 755 F. Supp. 79 (S.D.N.Y. 1991) 6

TABLE OF AUTHORITIES—Continued

Page

Republic of Argentina v. *Weltover*, 112 S. Ct. 2160 (1992) 12, 22, 24
Resource Dynamics Int'l v. *General People's Comm.*, 593 F. Supp. 572 (N.D. Ga. 1984) 19
Saudi Arabia v. *Nelson*, 113 S. Ct. 1471 (1993) ..... *passim*
Sea Lift v. *Refinadora Costaricense de Petroleo*, 601 F. Supp. 457 (S.D. Fla. 1984), *rev'd on other grounds*, 792 F.2d 989 (11th Cir. 1986) 18
Shapiro v. *Republic of Bolivia*, 930 F.2d 1013 (2d Cir. 1991) 15, 17
Siderman de Blake v. *Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993) 15, 18, 25
Stena Rederi AB v. *Comision de Contratos Del Comite*, 923 F.2d 380 (5th Cir. 1991) 25
Texas v. *Mead*, 465 U.S. 1041 (1984) 13
Transamerican S.S. v. *Somali Democratic Republic*, 767 F.2d 998 (D.C. Cir. 1985) 19
United States v. *Johnston*, 268 U.S. 220 (1925) 13
Vermeulen v. *Renault, U.S.A.*, 985 F.2d 1534 (11th Cir. 1993) 25

STATUTES

Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.* ..... *passim*
28 U.S.C. § 1605(a)(1) 10, 15, 16
28 U.S.C. § 1605(a)(2) ..... *passim*

LEGISLATIVE MATERIALS

H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. (1976), *reprinted in* U.S.C.C.A.N. 6604, 6617 16

MISCELLANEOUS

Emiri Decree No. 3 of the Emirate of Dubai (1984) ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

Nos. 93-1361 and 93-1389

THE DREXEL BURNHAM LAMBERT GROUP INC.
and REFCO, INC.,
Petitioners,

v.

THE COMMITTEE OF RECEIVERS FOR A.W. GALADARI
and THE EMIRATE OF DUBAI,
UNITED ARAB EMIRATES,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENT THE COMMITTEE OF RECEIVERS FOR A.W. GALADARI

Respondent The Committee of Receivers for A.W. Galadari ("the Committee") respectfully requests that this Court deny the petitions for a writ of certiorari filed by The Drexel Burnham Lambert Group Inc. ("Drexel") and Refco, Inc. ("Refco") that seek review of the decision of the United States Court of Appeals for the Second Circuit.[1]

---

[1] In compliance with Rule 29.1 of the Rules of this Court, the Committee represents that it is a judicial and quasi-judicial agency or instrumentality created by a sovereign decree of the Emirate of Dubai. The Committee does not have any parent or subsidiary companies.

OPINIONS BELOW

The decision of the court of appeals is reported at 12 F.3d 317 (2d Cir. 1993) (Pet. App. 1a-30a).[2] The district court decision that was reversed by the court of appeals is reported at 810 F. Supp. 1375 (S.D.N.Y. 1993) (Pet. App. 33a-72a).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602-1611, are set out in Appendix A, 1a-3a.

STATEMENT OF THE CASE

Pursuant to Rule 15.1 of the Rules of this Court, Respondent provides the following statement of facts to correct the misstatements contained in the Drexel and Refco petitions.

A. The Appointment And Activities Of The Committee Of Receivers

The Committee of Receivers was created by Emiri Decree No. 3 of the Emirate of Dubai ("the Emirate") in April 1984 to (1) marshal and liquidate the non-banking assets and businesses of A.W. Galadari, a Dubai citizen, and (2) adjudicate the claims of creditors. Pet. App. 4a. In 1983, Galadari and his businesses, which included the Union Bank of the Middle East ("UBME") and A.W. Galadari Commodities ("Commodities"), a commodities trading business, had experienced a severe liquidity crisis that led to the government takeover of the UBME. Pet. App. 4a.

Decree No. 3 (Em. App. 4a-13a) set forth a comprehensive bankruptcy scheme for the distribution of the

---

[2] "Pet. App." refers to the Appendix to either the Drexel or Refco Petitions for Certiorari, which are identical; "App." refers to the Appendix to this Brief in Opposition; "Em. App." refers to the Appendix to the Brief in Opposition of the Emirate of Dubai.

proceeds realized from the sale of Galadari's non-banking assets among creditors. It appointed as Committee members four leading Dubai citizens, vested them with control over all Galadari non-banking assets and authorized them to bring or defend any legal proceedings on behalf of Galadari or any Galadari entity.[3]

The Decree authorized the Committee "to terminate or to carry on and manage the respective businesses of the Galadari Companies" but only "so far as may be necessary for the sale of the Galadari Assets and/or Galadari Companies." Em. App. 7a. Although the Committee was required, at least initially, to continue to operate temporarily certain assets and businesses formerly owned by various Galadari entities, it did so only until such assets could be sold or otherwise disposed of.[4]

The Committee's decisions are subject to review by a specially created judicial committee. To date the Committee has administered and adjudicated the claims of more than 700 creditors with claims totalling more than $770,000,000 against various Galadari entities. It has distributed approximately $400,000,000 to creditors of various Galadari entities (including A.W. Galadari Holdings (Private) Ltd. ("Holdings")). The approximately 60 creditors (including Drexel and Refco) who have asserted claims aggregating more than $161,000,000 against Galadari individually and/or Commodities have not received any distribution from the Committee be-

[3] The district court found the Committee members to be "independent and capable individuals" who did not suffer from any conflict of interest that would prohibit them from serving as trustee under the U.S. Bankruptcy Code. *Drexel Burnham Lambert Group, Inc.* v. *Galadari*, No. 84 Civ. 2602, 1987 WL 6164, *22 (S.D.N.Y. Jan. 29, 1987).

[4] The Committee did not engage in any such activity at any time in the United States. Nor did it engage in any such activity on behalf of Galadari's commodities trading business, any suggestion to the contrary by Petitioners notwithstanding (Drexel Pet. 5; Refco Pet. 6).

cause neither Galadari nor Commodities has any assets from which a distribution could be made. All of these approximately 60 creditors have been treated alike.

B. The Original *Drexel* and *Refco* Actions

The complaints in both the *Drexel* and *Refco* actions, filed in 1984, asserted breach of contract claims solely against Galadari and Commodities. Pet. App. 5a; 7a. The Committee was not named or even mentioned in those complaints. *See* Pet. App. 5a; 7a. These original claims are not at issue in this proceeding because liability has since been admitted. It is only the later-filed claims against the Committee and the Emirate—asserted for the first time in 1992—that are the subject of this appeal.[5]

1. *The Drexel Case*

When the Committee appeared in the *Drexel* case, it did so solely in its representative capacity "on behalf of Galadari and Commodities" by filing an answer that asserted various affirmative defenses. Pet. App. 5a. The Committee did not invoke the defense of sovereign immunity at that time because the complaint asserted only breach of contract claims against Galadari and Commodities, two non-immune defendants. Promptly after filing an answer, the Committee moved to dismiss or stay the *Drexel* action in deference to the Committee's own receivership proceedings in Dubai. Pet. App. 5a. The district court granted the motion, but the court of appeals reversed and remanded for additional fact findings.[6] Pet. App. 6a.

---

[5] Drexel and Refco repeatedly mischaracterize the claims against the Committee as claims for "nonpayment" or "refusal to pay" or "reneging on their obligations to pay" the debts owed by Galadari and Commodities. *E.g.*, Drexel Pet. 19; Refco Pet. 15. The Committee, however, was not the obligor on those debts. Petitioners' claims against the Committee are based solely on the Committee's adjudication in April 1991.

[6] *Drexel Burnham Lambert Group, Inc.* v. *Galadari*, 777 F.2d 877, 881 (2d Cir. 1985).

In 1986, Drexel sought to enjoin the Committee from proceeding with its own adjudication of Drexel's claim in Dubai. *Id.* In opposing the motion, the Committee noted that because relief was being sought against it for the first time, Drexel should be required to amend its complaint to add the Committee as a party, so that the Committee could assert its FSIA defenses properly. *Id.* The district court, however, denied the motion without requiring an amended pleading. *Id.* In January 1987 the district court issued a stay of the Drexel action on the grounds of comity, holding that the procedures set forth in the Decree were consistent with our "basic notions of fairness and due process" and were "fundamentally fair to all creditors." Pet. App. 6a.

2. *The Refco Case*

Refco brought suit in New York State Supreme Court, seeking to collect a debt arising from commodities trading pursuant to a letter agreement. The Committee first appeared in the *Refco* case solely in its representative capacity in opposition to Refco's motion for an attachment of certain real property. The Committee's opposition was based, *inter alia*, on the grounds of comity. Pet. App. 7a.

The state court denied Refco's motion but *sua sponte* added the Committee to the caption as an additional defendant. *Id.* The Committee promptly filed a motion to dismiss, asserting that it was immune from suit under the FSIA. *Id.* That motion was later withdrawn without prejudice by agreement between the parties, as a result of which the prosecution of the *Refco* action was stayed by agreement pending the adjudication of Refco's claim in Dubai. Pet. App. 7a-8a.

Dissatisfied with the progress of proceedings in Dubai, in 1990 Refco sought to reactivate its state court action, whereupon the Committee removed the *Refco* case to federal court. *Id.* Refco sought to remand its case to state

court, but the district court denied Refco's motion. In so doing it held that the Committee functioned as a "judicial or quasi-judicial body" and was "an agency or instrumentality of a foreign state" and thus a "foreign state" within the meaning of the FSIA. *Refco, Inc.* v. *Galadari*, 755 F. Supp. 79, 82 (S.D.N.Y. 1991).

C. Petitioners' Efforts To Lift The Stay

From early 1987 until late 1990 the parties focused their attention on the Committee's receivership proceedings in Dubai. In those proceedings, Drexel and Refco claimed that even though their contract claims were asserted against Galadari and Commodities, they should be paid out of the assets of Holdings because Commodities allegedly was a division of Holdings rather than a separate partnership. Pet. App. 8a. Holdings had significant liquid assets whereas Commodities did not. Pet. App. 8a.[7]

In late 1990 and early 1991, respectively, Drexel and Refco moved to vacate the stay on the grounds that the Committee had unfairly delayed its decision on their claims and failed to accord them due process in Dubai. Pet. App. 8a. The motions were denied, conditioned on the Committee's issuance of a decision by April 16, 1991.[8] On April 14, 1991, the Committee issued its de-

---

[7] The proceedings in Dubai were complex and extremely time-consuming. The hearings on the Holdings/Commodities issue alone included oral testimony from more than 20 witnesses that consumed more than 2,650 pages of transcript; more than 250 exhibits were submitted and more than 20 expert opinions were presented on the issues raised.

[8] *Drexel Burnham Lambert Group, Inc.* v. *Galadari*, 127 B.R. 87, 107 (S.D.N.Y. 1991); *Drexel Burnham Lambert, Inc.* v. *Galadari*, 135 B.R. 719, 728 (S.D.N.Y. 1991). These two opinions, which criticized the Committee and its former counsel for their conduct, were nonappealable. Therefore the Committee has had no opportunity to demonstrate why the district court's criticisms were unjustified.

cision in which it admitted Drexel's and Refco's claims against Galadari and Commodities but rejected their claim that Commodities was a division of Holdings. Appendix B, App. 4a-39a; Pet. App. 9a.

Drexel and Refco thereupon renewed their motions to lift the stay. *Id.* The district court granted the motions, holding that the proceedings were no longer entitled to comity deference because of the manner in which the Committee had conducted them.

D. The Claims Against The Committee

Following the decision, the Committee served an amended answer to the *Drexel* complaint. *Id.* The defense of sovereign immunity again was not raised because the only claims pending were breach of contract claims against non-immune defendants. The Committee also served its first responsive pleading to the *Refco* complaint in which the defense of sovereign immunity was asserted (as a precaution) because of the *sua sponte* naming of the Committee as an "additional defendant" by the state court. Pet. App. 8a.[9]

In October 1991, Petitioners moved for leave to file amended and supplemental complaints so that for the first time they could add the Committee and the Emirate (as its "alter ego") as defendants and assert entirely new claims directly against them. Pet. App. 10a. (They also sought to name Holdings as a defendant.) The Committee objected on the grounds that such an amendment would be futile, *inter alia*, given the existence of FSIA defenses. *Id.*

---

[9] Consistent with its decision, the Committee also (a) deleted all but one, comity, of the affirmative defenses asserted in its original answer to the Drexel complaint and (b) admitted the allegations as to the amounts of the debts owed Petitioners by Galadari and Commodities. This left Drexel and Refco in a position to move immediately for judgment on the pleadings on their breach of contract claims, which they have chosen not to do.

The district court nevertheless granted Petitioners' motion (Pet. App. 10a), stating that the proper time to raise the defense of sovereign immunity was on a motion to dismiss, not in response to a motion for leave to amend. The parties then entered into a stipulation by which counsel for the Committee agreed to accept service of the amended and supplemental complaints on behalf of the Committee "*qua* Committee and as representative of Galadari, Commodities and Holdings" without prejudice to or waiver of any jurisdictional defenses or to the Committee's right to assert the defense of sovereign immunity. Pet. App. 10a-11a.[10]

A month later, Petitioners filed their amended and supplemental complaints which sought money damages from the Committee (and the Emirate) on the grounds that, by virtue of its April 1991 decision, (1) the Committee had "taken" Petitioners' property without just compensation in violation of international law; (2) the Committee was liable for misrepresenting to Petitioners and the district court its intention to adjudicate Petitioner's claims in Dubai promptly and fairly; and (3) the Committee, as successor-in-interest to Galadari and Commodities, was liable for refusal to pay their debts. Pet. App. 10a.

The Committee and the Emirate promptly moved to dismiss on the grounds that they were immune from suit under the FSIA. Pet. App. 11a.[11] They also argued that

---

[10] The stipulation entered into by the parties makes abundantly clear that the Committee had preserved its sovereign immunity defense. *See* Pet. App. 10a-11a (quoting stipulation).

[11] The Committee also filed answers to the amended and supplemental complaints on behalf of defendants Galadari and Commodities. Consistent with its prior actions, the Committee did not assert the defense of immunity to the original breach of contract claims against these defendants. The Committee did not enter an appearance on behalf of newly named defendant Holdings, leaving Petitioners free to seek a default judgment.

the suit was barred by the Act of State doctrine, the doctrine of judicial immunity and the applicable statutes of limitation. *Id.* The district court denied the motions (Pet. App. 33a-72a), finding that the implied waiver and commercial activity exceptions to sovereign immunity applied.

E. The Decision Below

Reversing the district court, the court of appeals held that jurisdiction did not exist under either the waiver or commercial activity exceptions. Pet. App. 3a. The court emphasized that, consistent with the decisions of every other circuit, the waiver exception of the FSIA must be "construed narrowly" (Pet. App. 15a) and that any waiver must be "unmistakable" and "unambiguous." Pet. App. 17a. Rejecting arguments that the Committee had waived its immunity by failing to invoke the FSIA previously in connection with the claims asserted against Galadari and Commodities, the court held that the Committee had timely invoked its immunity after it was named as a defendant in the amended and supplemental complaints in 1992 and thereafter moved to dismiss. The court also held that the Committee had consistently signalled its intent to invoke FSIA immunity, either by invoking immunity or by reserving the right to do so, on no less than five previous occasions during the course of the litigation. Pet. App. 17a-18a. It concluded that such actions did not provide evidence of an "unmistakable" and "unambiguous" waiver of FSIA immunity. Pet. App. 18a.

As to commercial activity, the court of appeals held that Petitioners' 1992 claims against the Committee and the Emirate did not fall within the third clause of the FSIA's commercial activity exception. Pet. App. 23a-27a. The court found that the gravamen of such claims was not commercial activity. They were "based upon" acts that were essentially judicial and therefore sovereign, *i.e.*,

the adjudication by the Committee in Dubai of the merits of Petitioners' claims asserted there. Pet. App. 25a.

The court of appeals also found that the adjudication of Petitioners' claims did not occur "in connection with" any commercial activity of the Committee elsewhere. After expressing serious doubt as to whether the Committee had engaged in any "commercial activities" in marshalling and liquidating assets (Pet. App. 24a n.3, 25a), the court held that, even assuming the Committee had engaged in some commercial activity, such activity was too "tangential" or "attenuated" to the Committee's adjudication of Petitioners' claims to satisfy the third clause of Section 1605(a)(2).

In dissent, Chief Judge Newman differed only with what he viewed as the majority's premature conclusion that the Committee's adjudication of Petitioners' claims was a judicial act, favoring discovery on the issue. Pet. App. 29a. The dissent neither disagreed with nor even discussed the majority's conclusion that immunity had not been waived or the majority's legal analysis of Sections 1605(a)(1) and (2).

REASONS FOR DENYING THE PETITIONS

1. There is no reason to review the decision below on the question of waiver. Petitioners' request for review on this issue primarily disputes the treatment of the facts by the court of appeals, which is not a proper reason for review by this Court. The court below analyzed the facts in light of the statute and the case law and concluded that as soon as claims were asserted or relief sought against the Committee itself, the Committee unmistakably and unambiguously asserted, or preserved its right to assert, its FSIA defenses.

Nor did the Committee waive its sovereign immunity defenses to the 1992 causes of action by appearing in a representative capacity in 1984 on behalf of the original,

non-immune defendants in the *Drexel* and *Refco* actions. The court of appeals listed five separate occasions on which the Committee made clear, before Drexel or Refco filed their amended and supplemental complaints, that the Committee intended to invoke its sovereign immunity defenses under the FSIA when and where appropriate.

On this record and consistent with all relevant decisions by other courts of appeals, the court below properly concluded that no waiver had occurred here. There being no important question of interpretation under the FSIA and no conflict among the courts of appeals, review by this Court is unnecessary.

2. There is no reason to review the decision of the court below on the inapplicability of the commercial activity exception to sovereign immunity. Petitioners' arguments in favor of review are based on a misreading of the decision below.

The third clause of the commercial activity exception requires Petitioners to demonstrate that their claims are "based upon" an "act outside the territory of the United States" that is "in connection with" commercial activity elsewhere, which act has a direct effect in the United States. Contrary to the claims of Petitioners, the court below did not require that the "act outside the territory of the United States" that forms the basis for the complaints here be a "commercial" act or that the "direct effect" in the United States must result from commercial activity elsewhere. The court merely held that in this case, Petitioners' causes of action are not based upon the doubtful "commercial" activity urged by Petitioners below (the marshalling, managing and liquidating of assets), but rather upon the adjudication of Petitioners' claims in Dubai, an indisputably sovereign act that could not be performed by private parties.

Similarly, the court below did not conclude that the "direct effect" required by clause three of Section 1605

(a)(2) can only flow from a commercial act outside the territory of the United States. The court merely held that in this case, the doubtful commercial activities on which Petitioners based their claims were not "activities that 'cause[d] a direct effect in the United States,' § 1605 (a)(2), upon which the claims of Drexel and Refco are based." Pet. App. 24a. Thus the court linked the "act" that is the basis for the cause of action and the "direct effect" in the United States, just as the statute requires and Petitioners demand.

Finally, focusing on the "in connection with" requirement of the third clause, the court below concluded that where, as here, no more than an attenuated connection exists between the sovereign act on which a claim is based and the activities alleged to be commercial in nature, jurisdiction did not exist. This decision is consistent both with the language of the statute and the recent decisions of this Court in *Saudi Arabia* v. *Nelson*, 113 S. Ct. 1471 (1993), and *Republic of Argentina* v. *Weltover*, 112 S. Ct. 2160 (1992). It does not conflict with the decisions of any other court of appeals. Review by this Court therefore is unnecessary.[12]

---

[12] Review is also unnecessary because the court below could have denied the relief sought by Petitioners on several other alternative grounds, including Act of State, judicial immunity and the takings and tort provisions of the FSIA. These grounds are discussed in the Opposition Brief of the Emirate of Dubai (at 20-26), which demonstrates that the questions presented for review by Petitioners may be academic, further emphasizing the lack of any "special or important reasons" for granting certiorari in this case. *See* S. Ct. Rule 10.1.

I. THE DECISION BELOW DOES NOT RAISE ANY IMPORTANT ISSUES CONCERNING WAIVER UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT.

A. The Petitioners Raise Primarily Factual Challenges To The Decision Below.

The court of appeals examined the record in this case and concluded that it did not support a finding of waiver under the FSIA. Pet. App. 18a. Properly analyzing the claims below and distinguishing between the 1984 claims asserted against Galadari and Commodities and the 1992 claims asserted against the Committee, the court of appeals correctly concluded that the Committee not only asserted its sovereign immunity defenses in a timely fashion, *i.e.*, after it was sued, but also that it clearly signalled its intent to assert the defense of sovereign immunity even before it was sued—on at least five separate occasions. Pet. App. 17-18a.[13]

Petitioners disagree with this analysis and seek review by this Court because the court below "ignored the evidence" (Refco Pet. at 19) and "facts of record." Drexel Pet. at 10-11. Petitioners' arguments over the facts only serve to emphasize that certiorari should not be granted in this case. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *see Texas* v. *Mead*, 465 U.S. 1041 (1984) (Stevens, J.).

Moreover, the facts are precisely as the court below found, not as Petitioners seek to rewrite them. The "undisputed facts" (Pet. App. 13a) demonstrate that at the time the Committee first appeared on behalf of Galadari and Commodities in the *Refco* and *Drexel* proceedings, the only claims pending were breach of contract claims

---

[13] The court failed to note a sixth prior invocation of immunity, when Petitioners moved for sanctions following the lifting of the stay in the district court.

asserted against non-immune private parties. The Committee could hardly have asserted the defense of sovereign immunity in responding to complaints that sought no relief against it.

As the court below noted, the first time Drexel sought relief against the Committee, as opposed to Galadari or Commodities (in 1986, when Drexel sought an injunction prohibiting the Committee from continuing with its proceedings in Dubai), the Committee immediately raised the defense of sovereign immunity. Pet. App. 17a-18a.[14] Similarly, in the *Refco* case when the New York State Supreme Court *sua sponte* added the Committee to the caption as a defendant, the Committee immediately asserted its immunity under the FSIA by filing a motion to dismiss (which was later withdrawn by agreement without prejudice). Pet. App. 7a. When the Committee first answered the Refco complaint (its name having been added as an additional party), it asserted sovereign immunity as an affirmative defense as a precaution even though the complaint did not assert any claims against the Committee. Pet. App. 8a.

When Drexel and Refco moved in 1991 for leave to amend their complaints to add claims directly against the Committee and the Emirate, the Committee opposed the motion, *inter alia*, on the grounds of sovereign immunity. When Petitioners sought to serve the Committee with their amended complaints, they did so pursuant to a stipulation that expressly preserved the Committee's right to assert its FSIA defenses. Once Petitioners amended their complaints in 1992 to add the Committee as a party

---

[14] Other than the Committee's filing of an answer and Drexel's motion for an injunction, the only activity in the *Drexel* case from 1984 until 1991 related to the Committee's motions to dismiss or stay proceedings in the district court pending the outcome of the proceedings in Dubai. All of the alleged activity cited by Drexel in its petition (Drexel Pet. 10) occurred in connection with the Committee's motions to dismiss or stay.

and assert claims against it for the first time, the Committee raised its FSIA defenses in a proper and timely fashion by filing a motion to dismiss both complaints. Pet. App. 17a.

Despite Petitioners' attempts to ignore and recast these facts, the court below had more than adequate support in the record for its determination that on numerous occasions the Committee acted to assert, or preserve, its FSIA defenses. There is no reason for this Court to review that determination.

B. The Decision Below Is Consistent With The Statute And The Case Law.

The court below made no mistake in applying the law of waiver to the facts before it. The FSIA provides that a foreign state shall not be immune from the jurisdiction of United States courts in any case where the foreign state has waived its immunity "either explicitly or by implication." 28 U.S.C. § 1605(a)(1). Construing this statutory provision and its legislative history, all of the courts that have considered the matter, including the court below, have held that the implied waiver provision of Section 1605(a)(1) must be construed narrowly.[15]

---

[15] *Shapiro* v. *Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991) (the waiver must be "unmistakable" and the circumstances "unambiguous"). *Accord Foremost-McKesson Inc.* v. *Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990), *on remand*, 759 F. Supp. 855 (D.D.C. 1991) (same); *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 377-78 (7th Cir. 1985) (A waiver cannot be found absent evidence demonstrating a "conscious decision to take part in the litigation and a failure to raise sovereign immunity despite the opportunity to do so"); *Joseph* v. *Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1022 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988) ("narrowly construed"); *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 720 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993) (same); *see also Canadian Overseas Ores Ltd.* v. *Compania De Acero Del Pacifico, S.A.*, 727 F.2d 274, 277 (2d Cir. 1984) (entering into stipulations

Given the language of the statute and the case law interpreting it, it is difficult to credit Petitioners' claim (Refco Pet. 19; Drexel Pet. 9-10) that the decision below contravenes the statute's "plain meaning." The statutory language simply states that a waiver may occur "either explicitly or by implication." 28 U.S.C. § 1605(a)(1). The "plain meaning" of this clause therefore must be determined by application of the terms "explicitly" or "by implication" to the facts. Guided by the numerous court of appeals decisions on this point, the court below applied the language of the statute to the facts before it and reached the proper conclusion.[16]

Petitioners' challenge to the decision of the court of appeals is no more than a reiteration of the arguments, rejected by the court below, that the Committee's actions taken in a representative capacity on behalf of two non-immune defendants amounted to a "general appearance" by "the real party in interest," and that such general appearance constituted a waiver as to jurisdiction over any later-filed and different claims against the Committee itself. This misses the point as to FSIA waiver.

The court of appeals recognized that the Committee's pre-amendment conduct (in seeking comity deference with respect to breach of contract claims against non-immune defendants) could not form the basis of an implied waiver with respect to Petitioners' 1992 claims against the Com-

---

waiving certain defenses and extending time to answer prior to assertion of sovereign immunity was not a waiver).

[16] Drexel's argument concerning the "plain meaning" of the statute (Drexel Pet. 9-10) is actually based on language in the legislative history, which, unlike the statute, refers to a situation in which a foreign state *against whom a claim has been asserted* files a responsive pleading without asserting the defense of immunity. H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 17 (1976), *reprinted in* U.S.C.C.A.N. 6604, 6617. The excerpt cited from the legislative history does not refer to the situation here, where a foreign state against whom no claim has been asserted appears in a representative capacity on behalf of non-immune, insolvent parties.

mittee—which claims are based upon *different* conduct occurring at *different* points in time against *different* parties under *different* legal theories. *See Shapiro* v. *Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991) (refusing to find that a foreign sovereign's prior participation in litigation "with respect to a particular matter constitutes a waiver of immunity from jurisdiction as to associated claims.")[17]

As the court of appeals noted, no matter how the Committee's pre-amendment conduct is characterized, "given its understanding of its position," the Committee "consistently invoked FSIA immunity, or reserved the right to do so in the future, to an extent that precludes a determination that FSIA immunity was unambiguously and unmistakably waived." Pet. App. 21a. This conclusion is consistent with the narrow application of the statute and the case law and should not be revisited here.

C. There Is No Conflict Among The Circuits Requiring This Court's Attention.

Petitioner Drexel erroneously claims a conflict "with every federal decision on this issue" (Drexel Pet. at 11), while Refco merely suggests that the decision of the court below on waiver is "at variance" with precedent in the Ninth Circuit. Refco Pet. at 21. However the argument is couched, the decision below creates no conflict among the circuits or even among "federal decisions" on this issue.[18]

---

[17] There is no authority for the proposition that a foreign state's participation in litigation for the purpose of seeking a dismissal or stay on the grounds of comity can give rise to an implied waiver. The only authority that has addressed a similar issue reached the contrary conclusion. *Foremost-McKesson, Inc.* v. *Islamic Republic of Iran*, 905 F.2d 438, 445 (D.C. Cir. 1990), *on remand*, 759 F. Supp. 855 (D.D.C. 1991).

[18] One of the "federal" decisions cited by Drexel (Drexel Pet. at 11-12) was decided by a New York state court.

None of the cases cited by Petitioners involved the precise issue presented here (*i.e.*, whether a foreign state appearing in a representative capacity on behalf of non-immune defendants waives its own immunity from suit with respect to future claims). The only allegedly contrary court of appeals decision cited by Petitioners is the Ninth Circuit's decision in *Siderman de Blake* v. *Republc of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993). Refco Pet. at 21; Drexel Pet. at 11. *Siderman*, however, involved only a remand to the district court for further proceedings on the issue of waiver. It suggests, but does not hold, that the *affirmative* use of California courts by a sovereign to further a sovereign's criminal case against the plaintiff might constitute a waiver of immunity in a case brought by the plaintiff against the sovereign. *Id.* at 720. *Siderman* is not applicable to the facts in this case: No affirmative use of the district court was made by the Committee here; its appearance in the Drexel and Refco actions was only to seek comity deference to its own judicial proceedings in Dubai.[19]

---

[19] The other lower court cases cited by Petitioners are similarly distinguishable. In *Aboujdid* v. *Singapore Airlines, Ltd.*, 67 N.Y. 2d 450 (1986), the plaintiff asserted claims directly against the foreign sovereign at the outset of its case. Waiver was found because the foreign sovereign answered the claims asserted and asserted a non-mandatory counterclaim against the plaintiffs and others, thus affirmatively using the forum to pursue remedies. There are no such facts present here.

Sea Lift v. *Refinadora Costaricense de Petroleo*, 601 F. Supp. 457, 465 (S.D. Fla. 1984), *rev'd on other grounds*, 792 F.2d 989 (11th Cir. 1986), is distinguishable because the defendant did not raise the sovereign immunity defense until trial. In *Corporacion Venezolana de Fomento* v. *Vintero Sales Corp.*, 477 F. Supp. 615, 620 (S.D.N.Y. 1979), *rev'd on other grounds*, 620 F.2d 786 (2d Cir. 1980), *cert. denied*, 469 U.S. 1087 (1984), a case that began before the FSIA became effective, the sovereign plaintiff argued to the district court, which raised the FSIA issue *sua sponte* after trial, that the FSIA did not apply. These cases provide no support for Petitioners' claims.

District court cases involving choice-of-law clauses, cited by Drexel (Drexel Pet. 13), are similarly irrelevant and raise no conflict among the circuits. In those few cases cited by Drexel that actually support the point argued, foreign sovereigns were held to have waived their immunity defenses by affirmatively entering into agreements that contemplated the application of U.S. law to the interpretation of the agreement at issue.[20] Thus there was present in such cases an affirmative, conscious decision to waive immunity that is not present here.[21]

In short, this case does not present any important issue of statutory construction or conflict among the circuits on the question of FSIA waiver. Nor is there even an important policy question, as Petitioners claim. Refco Pet. 20; Drexel Pet. 14. Construing the waiver exception narrowly is consistent with the restrictive theory of immunity codified in the FSIA. While it is perfectly appropriate for a U.S. court to examine the conduct of foreign

---

[20] Of the four cases Drexel cites as examples of the "numerous" court holdings on this point, only two district court cases (*Marlowe* v. *Argentine Naval Com.*, 604 F. Supp. 703 (D.D.C. 1985), and *Resource Dynamics Int'l* v. *General People's Comm.*, 593 F. Supp. 572 (N.D. Ga. 1984)) actually support Drexel's assertion. The holding in *Transamerican S.S. Corp.* v. *Somali Democratic Republic*, 767 F.2d 998 (D.C. Cir. 1985), does not discuss or rely on waiver, which is discussed only in the concurring opinion. And *Ohntrup* v. *Firearms Center, Inc.*, 516 F. Supp. 1281, 1284-85 (E.D. Pa. 1981), *aff'd*, 760 F.2d 259 (3d Cir. 1985), held that there was no waiver on the facts presented.

[21] Cases suggesting the alleged "longstanding well-established principle" (Drexel Pet. 14) that an appearance without asserting jurisdictional defenses is a waiver, are inapposite to a case under the FSIA. The only case Drexel cites for this argument, *Pilgrim Badge & Label Corp.* v. *Barrios*, 857 F.2d 1, 3 (1st Cir. 1988), does not involve either a foreign sovereign or the FSIA. Petitioners cannot imply jurisdiction over a foreign sovereign through application of statutes or case law unrelated to the FSIA. The only source of jurisdiction over a foreign sovereign or an agency or instrumentality of a foreign state is the FSIA. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989).

proceedings to determine whether comity justifies deferring or giving preclusive effect to the decisions of a foreign tribunal, it would not be appropriate, as a matter of policy, for a party to be permitted to pursue claims against a foreign tribunal in a U.S. court seeking to hold the foreign tribunal liable for its adjudication of creditors' claims in another country. In its refusal to permit such a result, the court of appeals rendered a decision that is fully consistent with the FSIA and its policy of restrictive immunity.

II. THE SECOND CIRCUIT'S DECISION REGARDING THE COMMERCIAL ACTIVITY EXCEPTION OF THE FSIA DOES NOT RAISE ANY IMPORTANT ISSUES REQUIRING REVIEW.

A. The Court Below Properly Applied The Statute.

In *Saudi Arabia* v. *Nelson*, 113 S. Ct. 1471, 1476 (1993), this Court stated: "[A] foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject matter jurisdiction over a claim against a foreign state." Of the three "commercial activity" exceptions available under section 1605(a)(2) of the FSIA, only one, the third, is at issue in this case. Thus, there is an exception to the general rule of sovereign immunity in this case only if it is a case

> in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). By its terms, the third clause of section 1605(a)(2) requires that three conditions be met: the action must be "based upon" (1) an act outside the United States (2) in connection with a commercial activity of the foreign state elsewhere (3) that has a direct effect in the United States. *Id.*

Petitioners contend that, contrary to the "plain meaning" of the statute and in conflict with the decisions of several courts of appeals, the court below misinterpreted and misapplied these requirements of section 1605(a)(2) in two respects: (1) by assertedly holding that the "act outside the territory of the United States" upon which the cause of action is "based" can only be a commercial act (Refco Pet. 14-15, 17; Drexel Pet. 17); and (2) by assertedly holding that the "direct effect" in the United States can only be caused by a commercial activity (Refco Pet. 11, 14; Drexel Pet. 17). Both contentions are wrong; this is not what the court of appeals held. Petitioners misinterpret and misunderstand the decision below.

The court below did not require that the act on which the action is based, the first requirement of clause three, must be commercial in nature. Rather, it held that Petitioners' claims *in this case* are not based on commercial activity. This holding responded directly to arguments made by Petitioners.[22] It also responded to the decision of the district court, which held that the Committee had engaged in "commercial activity" when it marshalled, managed and liquidated Galadari's assets and that such commercial activity had a direct effect in the United States.[23]

The court of appeals rejected Petitioners' and the district court's analysis. Without concluding (and in fact

---

[22] Petitioners had argued both in the district court and in the court of appeals that the gravamen of their claims was "commercial activity," thus implicating the first clause of section 1605(a)(2) as well as the third clause. Petitioners appear to have abandoned that argument in this Court and now appear to be relying exclusively on the third clause.

[23] The district court identified these acts as the "relevant acts" on which Petitioners' claims were based (Pet. App. 57a), essentially ignoring the Committee's adjudication. Thus the district court, not the court of appeals, erred by linking the "direct effect" clause with the "commercial activity" requirement.

expressing substantial doubt) that the interim operation pending sale of a business unrelated to commodities trading could constitute "commercial activity" within the meaning of the FSIA, the court below held that the marshalling, managing and liquidating of assets were not the activities "upon which the claims of Drexel and Refco are based" in this case. Pet. App. 24a.[24] In keeping with the requirements of the third clause of section 1605(a)(2) and the recent instruction of this Court in *Nelson* and *Republic of Argentina* v. *Weltover*, 112 S. Ct. 2160 (1992), the court below properly concluded that Petitioners did not assert claims that arose from or were based upon the commercial activity alleged, *i.e.*, from either the continued operation of the UBME (by another government entity, not the Committee) or the alleged interim management of unrelated Galadari businesses by the Committee. Pet. App. 24a.

Proceeding in accord with *Nelson*, the court below identified the "gravamen" of Petitioners' claims as the Committee's "essentially judicial"—and therefore sovereign—role of marshalling the assets of Galadari and Commodities and adjudicating the claims of their creditors. Pet. App. 24a. The court reached its conclusion by looking at the "nature" of the functions performed by the

---

[24] The court below termed "suspect" Petitioners' "depiction" of the actions of collecting and liquidating the assets of Galadari and Commodities as commercial, citing decisions of other courts of appeals. Pet. App. 24a n.3. This contradicts Refco's assertion that these activities were "acknowledged" by the court below as commercial. Refco Pet. 15.

The only specific "commercial activity" identified by the district court in its opinion was the interim operation pending sale of a hotel in Singapore. Pet. App. 58a. But this had nothing to do with commodities trading or the adjudication of Petitioners' claims. The only other alleged "commercial activity" identified by Petitioners related to the continued operation of the UBME, a function that in fact was not performed by the Committee, but was left to a specifically created Provisional Board unrelated to the Committee. *See* Decree No. 8, Em. App. 6a-7a.

Committee, as this Court directed in *Weltover*. The court recognized that Decree No. 3 charged the Committee with performing a dual function: as a judicial or quasi-judicial body, adjudicating creditors' claims, and as a liquidator or trustee, marshalling and liquidating assets to be distributed to creditors. Emirate App. 7a-10a. The court correctly found, however, that the "act" upon which the claims of Drexel and Refco were based was "essentially the adverse determination of their claims by the Committee" (Pet. App. 25a), a judicial act in Dubai that under Dubai law is exclusively a governmental function in which private parties may not engage. See Decree No. 3, Em. App. 10a (Committee has immunity from liability for its activities).[25]

Similarly, the court below did not hold, as Petitioners urge (Refco Pet. 11, 14; Drexel Pet. 17), that clause three's "direct effect" in the United States must be caused by commercial activity. Rather, the court examined the alleged commercial acts cited by Petitioners and concluded that they were not acts that "cause[d] a direct effect in the United States, *upon which the claims of Drexel and Refco are based*." Pet. App. 24a (emphasis added). The court below thus linked the "act" on which the cause of action is based with "direct effect[s] in the United States," reading the statute precisely as the Petitioners claim it should be read. Refco Pet. 17; Drexel Pet. 19.

Petitioners' citations to this Court's "observations" (Drexel Pet. 18; Refco Pet. 13) in *Nelson* concerning the distinction between claims "based upon" commercial ac-

---

[25] In this Court, Petitioners do not urge a contrary conclusion. Having apparently abandoned the argument that the gravamen of their claims was commercial activity, they now contend that the court below inserted in the statute the requirement of a "commercial" act as the basis of a cause of action. This contention was never presented to the court below, is not based on an accurate reading of the decision below, and therefore is not properly presented to this Court in this case.

tivity (clause one) and those based upon acts "in connection with" commercial activity (clauses two and three) do not dictate any different result from that reached by the court below. The court of appeals held that the "gravamen" of Petitioners' complaints—the adjudication by the Committee of their claims in Dubai—had no more than a tangential or attenuated relation to the alleged commercial activities here (if those activities in fact were commercial). The court of appeals' conclusion that such a tangential or attenuated relationship (between a sovereign act "gravamen" and "suspect" commercial activity) failed to meet the requirements of the FSIA was proper under the statute and the theory of restrictive immunity that it codifies. *See Republic of Argentina* v. *Weltover*, 112 S. Ct. at 2165.[26]

Far from misconstruing the statute, the court below merely held that where a cause of action is not based on a commercial act, as is true here, the connection between the non-commercial act and the "commercial activities elsewhere" must be stronger than is present here. Otherwise the exception to immunity would swallow the rule. Pet. App. 25a. The decision below is fully consistent with the language of the statute, the restrictive theory of immunity and the prior decisions of this Court.[27]

---

[26] Petitioners' citation to *Weltover* (Drexel Pet. 18; Refco Pet. 13) fails to provide any support for their claims. Contrary to Petitioners' assertions, this Court did not hold that the act upon which the cause of action was based in *Weltover*, the rescheduling of interest payments, was "sovereign," as was confirmed in *Nelson. Saudi Arabia* v. *Nelson*, 113 S.Ct. at 1479.

[27] To accept Petitioners' interpretation of clause three would in effect place every bankruptcy court outside the United States at risk of being hauled into U.S. courts by disgruntled creditors to face liability for their adjudicative acts. This is not the meaning or the purpose of the FSIA.

B. The Decision Below Does Not Conflict With The Decisions Of Other Circuits.

Petitioners' claim that there is a "split" (Drexel Pet. 20) or a "difference" (Refco Pet. 18) among the circuits regarding the proper interpretation of clause three of the commercial activities exception is plainly wrong for two reasons. It is based on Petitioners' misreading of the opinion below, and it is based on a misreading of the decisions of the Third, Fifth, Ninth and Eleventh Circuits.

In *Federal Insurance Co.* v. *Richard I. Rubin & Co.*, 12 F.3d 1270 (3d Cir. 1993), the Third Circuit found there was not a sufficient nexus within the meaning of *Nelson* between the "tort-like" claims for personal injury and the commercial "act outside the territory of the United States," a loan transaction. *Id.* at 1291. The Third Circuit therefore found that the tort cause of action was not "based upon" the commercial act. *Id.* The decision in *Federal* is consistent with the decision of the court of appeals here.

In *Vermeulen* v. *Renault, U.S.A.*, 985 F.2d 1534, 1544-45 (11th Cir. 1993), the Eleventh Circuit simply held that there is jurisdiction in U.S. courts over personal injury claims "based on" the "act" of designing and manufacturing automobiles "outside the territory of the United States" in connection with the "commercial activity" of selling cars worldwide. In *Vermeulen*, the "act" with "direct effects" was a commercial act. There is no conflict between *Vermeulen* and this case.

Similarly, in *Siderman*, 965 F.2d at 710, there was no contention that the "act" upon which the action was based —operating a business in Argentina—was anything but commercial. And Refco's citation to *Stena Rederi AB* v. *Comision de Contratos Del Comite*, 923 F.2d 380, 386 (5th Cir. 1991), only refers to a restatement of the statutory criteria: *Stena* does not address any clause three issue relevant to this case, although it holds that under

clause two there must be a "material" connection between the act on which the claim is based and the commercial activity to which it relates. *Id.* at 388.

Given the complete lack of evidence of any conflict between the decision below and other circuit court decisions, there is no basis for review by this Court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD W. REINTHALER
(Counsel of Record)
PAUL L. FRIEDMAN
DWIGHT A. HEALY
ANNE D. SMITH
WHITE & CASE
1155 Avenue of the Americas
New York, NY 10036
(212) 819-8200
Attorneys for Respondent
The Committee of Receivers
for A.W. Galadari

March 31, 1994

APPENDICES

APPENDIX A

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state

and that agency or instrumentality is engaged in a commercial activity in the United States;

* * *

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

* * *

APPENDIX B

IN THE MATTER OF THE COMMITTEE OF RECEIVERS
APPOINTED BY EMIRI DECREE NO. 3 OF 1984
CONCERNING THE FINANCIAL AFFAIRS OF
ABDUL WAHAB EBRAHAM GALADARI

and

IN THE MATTER OF THE CLAIMS OF
THE DREXEL BURNHAM LAMBERT GROUP INC.,
and REFCO INC.

DECISION

By a Formal Proof of the Debt Claim Form received by the Committee of Receivers of Abdul Wahab Galadari, appointed pursuant to Decree No. (3) 1984 of the Emirate of Dubai ("The Decree") on the 29th of July 1984, the Drexel Burnham Lambert Group Inc. ("Drexel") have claimed to be a secured creditor in the receivership constituted by the Decree in respect of an amount of US$ 12,740,129.53 (as at the 17th of April 1984). The particulars of the security claimed to be held is set out in the Proof of Debt Form, namely 6,068,640 Class B shares of Union Bank of the Middle East Ltd ("UBME") represented by share certificates numbers B7 and B10. The Proof of Debt Form was accompanied by, inter alia, a Promissory Note dated 14th September 1982 ("the Promissory Note") and executed by Abdul Wahab Galadari ("Galadari") in his personal capacity and also by Galadari on behalf of A.W. Galadari Commodities ("Commodities") as a partner thereof, pursuant to which Galadari and Commodities promised to pay the sum of US$ 19,465,000 together with interest thereon over any balance from time to time outstanding, at the rate of 13¾% per annum to Drexel Burnham Lambert International B.V. ("Drexel International"). The Promissory

Note evidenced a debit balance in the commodity trading account of Commodities. Drexel is claiming as assignee of the Promissory Note.

It is not clear from the Proof of Debt or Claim Form which of the Galadari Companies (as defined in the Decree) Drexel were claiming to be creditors of or whether Drexel were claiming as creditors of Galadari personally. There is nowhere on the Form for the debtor or debtor company to be named.

However, as of the date of the receipt of the Proof of Debt Form, the Committee considered that Drexel were claiming to be creditors of both Galadari and Commodities as these were the signatories to the Promissory Note.

It was not until June 20, 1986 that Drexel, for the first time, claimed that Commodities was a division of A.W. Galadari Holdings (Pvt) Limited ("Holdings") as described in the consolidated financial statements of Holdings and its subsidiaries for the year ended 31st March 1982 and as such that Drexel should be treated as a creditor of Holdings.

Pursuant to the terms of the Decree it is incumbent upon the Committee to determine the various issues raised with regard to Drexel's claim, in particular (i) whether Drexel's claim to rank as a creditor of Holdings was timely; (ii) whether Drexel's claim should be admitted in whole or part; (iii) whether Drexel's claim should be admitted in the receivership as a debt of Commodities and Galadari only, or whether Drexel should properly rank as a creditor of Holdings on the grounds that Commodities was at the relevant time a wholly or partially owned unincorporated business or "Division" of Holdings; and, (iv) whether Drexel holds or held a valid security over 6,068,640 shares of Class B stock of UBME or the proceeds thereof.

A Formal Proof of Debt or Claim Form has also been submitted to the Committee by Refco Inc ("Refco") un-

der cover of a letter from Refco dated July 16th 1984. Refco claims to be a creditor in the receivership in the sum of US$ 4,609,664.20. This amount is claimed by Refco to be the debit balance in the commodity trading account of Commodities with Refco. As with the Drexel Proof of Debt or Claim Form, it is not clear which of the Galadari Companies Refco were claiming to be creditors of. However, the Form was accompanied by an Appendix which advised that Refco held a letter dated July 6, 1983 signed by Galadari personally and as Chairman of Commodities in which, (i) a total debt of US$ 6,109,664.20 was acknowledged as due to Refco; (ii) Galadari confirmed that he personally was responsible for the repayment of US$ 3,000,000 of the balance outstanding; and (iii) that Commodities owed the balance of US$ 3,109,-664.20. The Committee were advised by Refco that Galadari had paid US$ 1,500,000 to Refco in respect of his personal liability. Refco claim to be a creditor of Holdings for the full amount claimed. The Committee must therefore determine (i) whether Refco's claim to rank as a creditor of Holdings was timely; (ii) whether Refco's claim should be admitted in whole or in part; and (iii) whether Refco's claim should be admitted in the receivership as a debt of Commodities and Galadari only, or whether Refco should properly rank as a creditor of Holdings.

In determining the various issues before it the Committee has been very conscious of the fact that it was appointed by the Decree of a sovereign state and that it must exercise its functions judicially. In doing so it has been acutely aware of the obligations to ensure that Drexel and Refco are treated fairly in the proceedings which they have brought before the Committee and are accorded every opportunity to ensure that all evidence concerning their claims are brought to the attention of the Committee. In conducting these proceedings the Committee has adopted an inquisitorial approach. The proceedings are not, and never have been adversarial in nature. How-

ever, in the process the Committee has also been fully aware of its obligations to the general body of creditors in the receivership to ensure that any claim, by any potential creditor, is only admitted after full investigation of the facts. In fulfilling this duty the Committee has been assisted by Mr. Carl Asher, then of Messrs Gaston & Snow and now of Messrs Bickel & Brewer, as counsel to the Committee to assist the Committee by putting forward an objective view of the evidence presented to the Committee by Drexel and also to put before the Committee evidence contrary to Drexel's position, in order for the Committee to properly fulfill its duty to the general body of creditors, that is, only admit claims against any particular Galadari Company which the Committee is satisfied after a full investigation of the facts is a proper debt of that particular Galadari Company. Mr. Asher and his firm had previously acted in certain proceedings in New York brought by Drexel against Galadari and Commodities, prior to the involvement of the Committee in those proceedings. The Committee considers that Mr. Asher, in fulfilling that role, has at all times acted in good faith towards Drexel.

Following upon the representations of Drexel made in meetings before the Committee on the 4th and 6th of February 1989, the Committee restricted the role of Mr. Asher and his firm in the Dubai proceedings. However, the Committee recognised the necessity to have some assistance from lawyers in fulfilling their judicial role and appointed Richards Butler as their independent confidential advisors. Richards Butler had not previously been involved in any way in the conduct of the receivership nor have they put before the Committee any evidence and have not acted in any adversarial capacity in any manner before the Committee. Since February 1989 neither the Committee nor its advisors has taken any advice on the evidence before it in these proceedings from Mr. Asher nor has the Committee or its advisors discussed any of the evidence with Mr. Asher. Mr. Asher has not been

involved in the Committee's decision making process although the Committee has adopted certain of the findings submitted by Mr. Asher in the course of 1987 when they had been of the opinion that such findings are supported by the evidence in the record.

Subsequent to the appointment of Richards Butler, and upon their advice, the Committee took the decision to appoint an independent firm of accountants, Spicer & Oppenheim (now know as Touche Ross & Co. but referred to in this decision as "Spicer & Oppenheim") to opine upon the accounting issues that arose in the matter. The Committee took this step as it considered that it would be failing in its duty to the general body of creditors in the receivership if it did not obtain the opinion of an independent accountant, the only accounting opinion in the record before them at that time being that of Price Waterhouse submitted by Drexel. Indeed, at the hearing before the Committee on the 6th of February 1989 Drexel's counsel invited the Committee to obtain such an opinion.

At no time did the Committee or Richards Butler on behalf of the Committee give any instructions to Spicer & Oppenheim concerning any conclusion that they should reach. The Committee has considered the representations made by counsel to Refco in their letter to the Committee dated 22nd of February 1991. Mr. Holden, the author of the Spicer & Oppenheim report was cross examined by counsel to Drexel for four-and-a-half days in December 1990. The Committee is satisfied that the report is independent. Any changes to the drafts of the report resulting from any representations made by Richards Butler did not in any way change the substance of the report. Furthermore, Mr. Holden consistently testified that the conclusions reached were reached independently and entriely on his own. He further testified that at no time did Richards Butler ever express any opinion on the subject of his report to him. The Committee has no reason to

doubt the integrity of Mr. Holden nor it would appear do Drexel doubt his integrity as has been stated by Drexel's counsel on the record. Therefore, the Committee finds that the Spicer & Oppenheim report is independent and will give it such weight as it considers appropriate in reaching its conclusions. Furthermore, the Committee does not consider Refco have been denied due process in respect of the Committee's decision not to allow them to cross-examine the author of the Spicer & Oppenheim report. Throughout these proceedings Refco have been content to permit Drexel to put the case to the Committee that at the relevant time Commodities was a "division" of Holdings. Refco have not requested that they be permitted to cross-examine any other witnesses relevant to the issue. The Committee considered that in such circumstances Refco should only participate as an observer in the cross-examination, which they did. In the event the cross-examination conducted by Drexel's counsel was extremely thorough, taking as it did some four-and-a-half days.

The Committee also notes that counsel to Drexel gave notice on a number of occasions at the cross examination of Drexel's intention to place a motion before the Committee that the report should be struck from the record no such motion has been made.

Professor Richard Speidel was also appointed by the Committee pursuant to Article 7(k) of the Decree to give a legal opinion on the question of Drexel's claim to a security interest. Drexel has requested permission to conduct cross-examination of Professor Speidel through oral questions to which he would provide oral answers. The Committee has permitted Drexel to conduct cross-examination of Professor Speidel through written questions to which Professor Speidel would provide written answers. The Committee, while recognizing the importance of cross-examination by oral questions posed to witnesses of fact, do not believe that such mode of con-

ducting cross-examination is particularly useful in respect of examination of an expert witness regarding opinions of law, whose evidence relates to legal theories and conclusions, necessarily depending upon the research of various topics. Furthermore, Drexel has failed to avail itself of the opportunity to cross-examine Professor Speidel through means of written questions and answers. Moreover, Drexel has failed to advance any reason why oral questions and answers are superior to written questions in respect of examining Professor Speidel with regard to the opinions he has proffered. The Committee observes that Drexel has failed to submit evidence from any American legal scholar of Professor Speidel's stature in opposition to his opinion.

Both Drexel and Refco have made a number of submissions to the Committee alledging that they have been denied due process in these proceedings. The Committee does not consider that either Drexel or Refco have been denied any due process to which they are entitled. However, if either Drexel or Refco are not satisfied that they have been given a full and fair hearing on all issues raised by them in the proceedings then their proper remedy is to raise these matters before the Judicial Committee appointed under the Decree.

There have also been a very large number of applications by Drexel during the long and complicated course of these proceedings. The Committee have given full and fair consideration to all these applications which has had the effect of lengthening even further the proceedings.

A. *Drexel's Claim*

1) Was Drexel's claim against Holdings timely?

Clause 7 (d) of the Decree provides that the Committee shall have power:

> "To require creditors to submit claims in such form or accompanied by such proofs, and

within such period as the Committee shall determine;"

The Committee initially invited creditors to submit completed Proofs of Debt or Claim Forms to them by the 31st of July 1984. Advertisements were placed in both the Arab and English press in Dubai. Furthermore, creditors identified on the books of any of the Galadari Companies were circularised with a standard letter from the relevant Galadari Company advising them that claims should be admitted by 31st July 1984 and inviting them to complete the Proof of Debt or Claim Form which was enclosed and return it to the Committee by that date.

Drexel submitted a Proof of Debt or Claim Form which was received by the Committee on the 29th of July 1984. Whilst this Form did not specify the debtor company from whom Drexel were claiming it was treated by the Committee as a claim against Galadari and Commodities as these were the signatories to the Promissory Note upon which Drexel relied, which was attached and the debt was recorded on the books of Commodities maintained in the receivership as a debt of Commodities.

The claim by Drexel to be a creditor of Holdings was made for the first time in June 1986, shortly after the first distribution to the creditors of Holdings and other Galadari Companies. This was outside the period set by the Committee for the submission of claims. Drexel has argued that its claim against Holdings is timely because nowhere in the Proof of Debt or Claim Form, submitted by Drexel in July 1984, is a creditor required to specify the Galadari company it is claiming against. Therefore Drexel did not do so. It has been submitted by Drexel that there is nothing on the face of the Proof of Claim Form which would give a creditor, who later came to believe that its claim involved the assets of an-

other Galadari Company, which in this case is Holdings, any reason to believe that the original Proof of Claim Form is inadequate.

Drexel has further argued that even if they were required to submit a Proof of Debt or Claim Form against Holdings in order to rank as a creditor of Holdings they met this requirement because in the Proof of Debt Form Drexel advised the Committee that they were asserting a claim against the assets of Holdings by asserting a security claim to the shares of UBME owned by Holdings and proportionally pledged to Drexel.

The Committee does acknowledge that the Proof of Debt or Claim Form received by the Committee on the 29th of July 1984 is not conclusive as to the Galadari Company from whom Drexel is claiming to be a creditor and finds that Drexel's claim to be a creditor of Holdings was timely made.

2) Should Drexel's claim be admitted in whole or in part for the purposes of the receivership?

Drexel have submitted a claim in the receivership of US$ 12,740,129.53 (as at 17th April 1984). This figure is based on a principal amount outstanding under the Promissory Note of US$ 12,465,000. Drexel claim this amount together with interest pursuant to the Promissory Note from 1st February 1984. The sum of US$ 12,465,000 represented the debit balance in the commodity trading account of Commodities with Drexel International N.V. as at 14th September 1982 of US$ 19,465,000 as reduced by payments under the Promissory Note during 1982 and 1983.

In November 1987 following upon a suggestion by Drexel and agreed by the Committee, and at the expense of Drexel the Committee appointed Mr. Ronald H. Filler to conduct an investigation and pro-

vide them with a written non-binding report, with respect to the circumstances surrounding the commodity trading activity in the account of Commodities with Drexel International that accrued prior to the delivery of the Promissory Note on 14th September 1982. Mr. Filler found no evidence of actions by Drexel International inconsistent with the reasonable and practical management of the 10500 Account maintained by Commodities when measured against what he considered to be the industry standards existing at the time.

The Committee further requested Mr. Filler to review and provide a further report on certain proprietary trading accounts of Drexel and its affiliates, to determine to what extent, if at all, these accounts traded gold futures contracts, gold bullion and other metals in a manner or pattern inconsistent with the trading activities of Commodities' Account No. 10500 which could constitute a violation of the United States Commodity Exchange Act or any regulations made pursuant to the Act. This report was delivered to the Committee in November 1989 and Mr. Filler found no pattern of trading in the accounts to require him to conclude that Drexel improperly traded any accounts against the accounts of Commodities during the period from August 1982 through September 1982.

In the absence of evidence in the record that Drexel acted improperly in either the closing of the 10500 Account in September 1982 or the operation of 10512 Account opened by Commodities in September 1982, the Committee accepts Mr. Filler's conclusions reached in his two reports regarding Drexel's actions concerning both the accounts of Commodities with Drexel International being the 10500 Account and the 10512 Account and, for the purposes of the receivership and for the distribution of dividends only, concludes that Drexel's claim in

the receivership should be admitted in the amount claimed being a principal sum of US$ 12,465,000 plus interest pursuant to the Promissory Note from 1st February 1984 to 29th July 1984 being the date of the submission of the claim in the receivership and thereafter at a simple rate of interest of 9% per annum on the principal sum in accordance with Dubai law on interest on claims.

3) Has Drexel a valid claim against Holdings?

Drexel contends that at certain relevant times Commodities was a wholly owned division or unincorporated business of Holdings or a partnership in which Holdings was a general partner. This has become known in these proceedings as the Commodities/ Holdings issue.

A great deal of evidence had been provided to the Committee concerning this issue including expert legal opinions from Freshfields, Simmons & Simmons, A.R. Hilal & Associates, Samir Saleh & Associates, Ja'afar Alwan & Associates and Ronald H. Filler. The Committee has also been provided with expert accounting opinions from Price Waterhouse and Spicer & Oppenheim. The Committee was also provided with an expert accounting opinion from Peat Marwick dated 20th October 1986. However, following submissions made on behalf of Drexel the Committee concluded it would not place any reliance on this opinion in reaching its conclusions and it has not done so.

Drexel has examined the various experts who submitted reports to the Committee and a record of these examinations forms part of the record before the Committee. Drexel have also examined various individuals before the Committee in Dubai at meetings of the Committee held on February 21st, 22nd, 23rd, 25th, 1987, April 5th 1987 and February 4th and 6th 1989. Furthermore, the Special Advisor ap-

pointed by the Committee, Mr. Filler, conducted interviews in both London and New York of various individuals which touched upon the Commodities/ Holdings issue. Drexel was present at these interviews. Interviews of all witnesses both before the Committee and before Mr. Filler have been transcribed and the records of these interviews are in evidence before the Committee. In addition the Committee has been provided with proposed findings relating to the Commodities/Holdings issue from both Drexel and counsel to the Committee, Mr. Asher. There are also many hundreds of pages of exhibits relating to this issue in the record. Thus, a voluminous record concerning the Commodities/ Holdings issue has been provided to the Committee for their consideration in reaching their conclusions.

It is not entirely clear from the evidence exactly when Commodities was formed. However, it would appear that it was formed some time in June 1980 as this was when an account, opened in the name of A.W. Galadari Commodities with UBME, received an initial cash deposit of Dhs 294,388.50. In any event Commodities commenced trading when a brokerage account was opened with Drexel International, a subsidiary of Drexel, in November 1980.

There is evidence that Commodities was formed in 1980 as a general partnership between Galadari and Mohammed Bashir with Galadari holding an 80% ownership interest. However, no written partnership agreement exists and Mr. Bashir has denied in testimony before the Committee that he was a partner in Commodities.

According to Mr. Bashir, he was asked to assist Galadari in Commodities on the understanding that if it made a profit, he would share in 20% of the profits. However, he said he would not be responsible for any of the losses of Commodities and that he was,

therefore, not a partner in the business. However, the audited financial statements of Commodities as at 31st March 1981 and 31st March 1982 were drawn up on the basis that Commodities was a partnership and the internal books of account indicate it was a partnership between Galadari and Mr. Bashir. Mr. Bashir also received a proportion of profits paid to him in March 1982 when US$ 2,000,000 of profit was distributed, US$ 1,600,000 being paid to Galadari and US$ 400,000 to Mr. Bashir.

We conclude, that on the basis of the record when considered as a whole on this issue, Commodities was, at all material times a partnership between Galadari and Mr. Mohammed Bashir with 80% being owned by Galadari and 20% by Mr. Bashir.

Drexel contends that, regardless of whether Commodities was formed as a partnership or was directly owned by Galadari as a sole proprietorship Galadari assigned his 80% or 100% interest in Commodities to Holdings at some stage prior to the 31st of March 1982.

The Committee has been presented with certain documentary evidence that Drexel argues supports the inference of such assignment or transfer and its acceptance by Holdings. The Holdings' books of account document the receipt from Galadari of funds originally emanating from Commodities, which funds were received and accounted for as income to Holdings. The Holdings accounts audited by Peat Marwick Taseer Hadi & Co. ("PMTH") for the year ending 31st of March 1982 which described Commodities as a "division" of Holdings and which purport to reflect the taking of Commodities' net income as profit to Holdings was signed by the Managing Director and Chairman of Holdings and formally approved by Holdings' Board.

On or about the 6th of March 1982, Galadari endorsed two Holdings' cheques in the amount of US$ 1,980,000 which he had received from Commodities the previous day. These cheques represented Galadari's individual share of the profits of Commodities for its financial year then ending, 31st March 1982, together with a periodic payment of the commissions due to him as a broker with Commodities. These funds, represented by the cheques made payable to Galadari were recorded as income of Holdings.

In a letter dated 23rd March 1982 PMTH wrote to Mr. Gary Botha, a Holdings Director, stating that during a meeting with Mr. T.M. Hameed and Mr. R. Dhedi the previous day, Mr. Dhedi told PMTH that Commodities "would form part of the consolidated financial statements of A.W. Galadari Holdings with effect from the year ending 31st March 1982." At the time the letter was written Mr. Dhedi was Holdings' Group Financial Services Manager and Mr. Hameed was Holdings' Chief Accountant. The letter further stated that it was the understanding of PMTH that they would be provided with audited financial statements of Commodities.

As promised, during the course of PMTH's examination of Holdings' books in the preparation of the audited financial statements for the year ending 31st March 1982, the audit partner in charge, Mr. Khurshid Hadi, was given access to a copy of the Commodities' financial statements for the period ending 31st March 1982 audited by Ernst & Whinney and dated 31st May 1982.

The PMTH audit report for Holdings for the year ending 31st March 1982 was issued on 9th November 1982. The notes to the Holdings' audit report describe Commodities as a "division" of Holdings in note 5 (e) (ii) and again note 23.

PMTH working papers for the audit also described Commodities as a division of Holdings. No evidence was presented to the Committee that Commodities was ever an incorporated entity or thus a subsidiary of Holdings.

The consolidated profit for the year as reported by the Holdings' Board of Directors in the 1982 audit, included Dhs 10,800,633 in respect of Commodities. This figure represented the entire net income of Commodities for the period ending 31st March 1982 shown by Commodities' audited accounts as US$ 2,919,090 and converted at Dhs 3.7 = US$ 1.

In the consolidated balance sheet of Holdings for the year ended 31st March 1982 the purported investment in, or equity of Commodities is shown as Dhs 3,918,359. This comprises the entire equity of Commodities at 31st March 1982 including undrawn profits which is shown in Commodities audited accounts as US$ 1,059,016 again converted at Dhs 3.7 = US$ 1.

The consolidated accounts of Holdings at 31st March 1982 were signed by Galadari, Chairman of Holdings and Mr. Sami, the Managing Director of Holdings and were approved by the Holdings' Board of Directors.

Article 65 of the Articles of Association of Holdings states that every balance sheet and profit and loss account of Holdings "give a true and fair view of the state of affairs of the company and its profit and loss." Article 66 of the Articles of Association of Holdings states that every balance sheet be signed by at least two directors, "one of whom shall be the Chairman of the company . . .".

Drexel relies on other evidence in support of their contention that there was an assignment of Galadari's

ownership interest in Commodities. This additional evidence is discussed below:

a) Holdings' Board Minutes for meetings held on 19th December 1981, 7th April 1982 and 6th July 1982 which make reference to Commodities.

i) In the Minutes of 19th December 1981, item 6 in the Minutes states as follows:

"Consolidation of Accounts

GN, ESI and AWG Comm. shall be consolidated for accounting purposes with the rest of the Group."

This Minute first appeared in the record as an exhibit to the Spicer & Oppenheim report and has been adopted by Drexel as further documentary support of their contention in Price Waterhouse's letter of 19th February 1991.

ii) In the Minutes of the 7th of April 1982 it is reported under the heading "Budget 1982/1983 Company Operation" in item 2 (vii) that Dhs 20 million was budgeted for Galadari Commodities.

iii) In the Minutes of the meeting held on 6th July 1982 it is stated that the "year's profit target fixed by the Board of Directors" for the listed "Companies/Divisions" includes a target of Dhs 20,000,000 for "AW Galadari Commodities".

b) In their working papers for the 1982 audit of Holdings, PMTH set forth an "extract" from a Holdings Board Minute which listed the monthly dividends that would be paid to Holdings by various of its entities including Commodities.

c) The capital accounts of the Commodities' "partners" totalled US$ 1,059,016 as of 31st March 1982 and this amount remained unchanged after that date. As of 28th February 1983 there was no change in the "partners' equity" accounts from 31st March 1982. The Commodities' monthly accounts for the period ending 29th February 1984 again shows "partners' equity" of US$ 1,059,017. Drexel argues that the relative inactivity of the capital accounts from 31st March 1982 onwards is further evidence of an assignment by Galadari of Commodities to Holdings effective from that date.

d) In a letter dated 11th August 1981 from Dennis Mandody, the General Manager of Commodities to the UAE Central Bank a response is enclosed to a Central Bank request for information. The letter states under the heading "Ownership and Direction" that Commodities is owned 80% by "Abdul Wahab Galadari, A.W. Galadari Holdings, P.O. Box 22, Dubai, U.A.E. and 20% by Mohammed Bashir, Mohammed Bashir & Sons, P.O. Box 689, Dubai, U.A.E.

e) In a letter dated 28th March 1983 from Mr. Robert Hughes of Ernst & Whinney to Commodities he confirmed that "we were informed . . . that Mr. Galadari has decided that AW Galadari Commodities should not be considered part of AW Galadari Holdings Group so that it is therefore not subject to the Group's reporting requirements and it is also intended to be decided that there should be no audit of the 1983 accounts." Drexel argues that the implication of this letter is that at least up to that time Commodities was considered part of Holdings. However, it is significant that Mr. Hughes, the partner at Ernst & Whinney in charge of the

audit of Commodities, and who gave evidence in the proceedings has denied he had any such information or intention at the time that he wrote that letter. Mr. Hughes has testified that he understood from discussions that he and his staff had conducted in or about May 1982 with Galadari and other members of Commodities' management, that Commodities was a partnership owned by Galadari and Mr. Bashir in the proportion of 80% and 20%.

f) A memo from Mr. Bashir to Mr. Mandody and Mr. Khan, both employees of Commodities, dated 30th August 1983. Mr. Bashir reports adjustments in salaries of certain Commodities staff made "with the consent and approval of Mr. A.W. Galadari, Chairman." Drexel submit that the reference to Mr. Galadari as "Chairman" makes no sense except in the context of his chairmanship in Holdings.

The Committee also has before it in evidence documentation which is not consistent with Galadari having assigned his interest in Commodities to Holdings. This documentation includes:

i) The books of Commodities which reflect a payment out to Galadari of US$ 1,600,-000 on 5th March 1982. This was transferred by Galadari to Holdings. Mr. Hughes has stated in his evidence that Galadari, when asked (by Mr. Hughes) if this meant he was acting as a nominee of Holdings, Galadari replied he was not;

ii) The trade licences for Commodities issued by the Dubai Municipality for the years 14th June 1981 to 13th June 1982, 14th June 1982 to 13th June 1983 and 14th June 1983 to 13th June 1984. These li-

cences do not reflect any change in the ownership of Commodities. All the certificates show the licensee to be Abdul Wahab Kildari (sic).

iii) The Promissory Note acknowledging Galadari Commodities' debt to Drexel was signed on 14th September 1982. The signatories on the Note are Galadari personally and Galadari as "partner" of Commodities.

iv) The "Partnership Account" form of Drexel International signed on 14th September 1982 is signed by Galadari on behalf of Commodities and certifies that "A.W. Galadari" is the only member of the partnership.

v) A draft report prepared by PMTH for UBME on the financial position of Holdings and dated 5th March 1983 is contradictory within itself and indicates that PMTH were not sure of the status of Commodities. Commodities is listed under the list headed "Group Companies" and is stated to be 100% held by the Group. However later in the document Commodities is referred to as being owned "personally" by Galadari.

vi) In a letter to the Financial Surveillance Officer of the London International Futures Exchange Limited from Dennis Mandody the General Manager of Commodities and dated 6th September 1983 it is stated "A.W. Galadari Commodities is a sole proprietorship of Abdul Wahab Galadari. In order to comply with the "Declarations" for non-clearing members of LIFFE, we

declare that the personal net worth of Mr. A.W. Galadari is in excess of GBP 100,000/-."

The Committee also heard the testimony of two former Holdings directors, Mr. Zubair and Mr. Sami and one former Holdings employee, Mr. Hameed, regarding their understanding of the relationship between Holdings and Commodities,

a) All three witnesses testified that according to their understanding Holdings did not own Commodities. These officials based their testimony primarily upon their direct experience in the overall and day-to-day business affairs of Holdings with which they were intimately familiar. The Committee accepts their evidence that neither Holdings nor its management had financial or management control over the business or operations of Commodities at any time.

b) Furthermore, Mr. Zubair, another former director of Holdings testified that he had been informed by both Galadari and Mr. Bashir that Commodities was a partnership owned by Galadari and Mr. Bashir and that Commodities was a separate company from the other companies in which Galadari held an interest. Mr. Zubair also confirmed that none of the Galadari Holdings' directors knew anything about Commodities and stated that Holdings had "no involvement; absolutely no involvement."

c) Mr. Hameed the Chief Accountant for Holdings, testified that it was his understanding that Holdings did not own Commodities and that he could not explain why Commodities was described as a division of Holdings in its 31st March 1982 accounts.

d) The Committee does not accept Drexel's argument that the question of Commodities' ownership should be totally divorced from consideration of Holdings' involvement in the operation of Commodities. However, the Committee believes it should not place great weight on testimony, even from directors of Holdings, which is based strictly upon consideration of Holdings' involvement or lack thereof in the operation of a particular Galadari business.

In addition Drexel argues that the former Holdings Board members actually confirmed that an assignment took place. Drexel relies on the following testimony:

a) Mr. Sami testified that the inclusion of Commodities in the 31st March 1982 Holdings accounts was a "misstatement" apparently done to "dress up the balance sheet."

b) Mr. Sami acknowledged that "anything that related to the Holdings would normally be brought up to the (Holdings) Board if it required the Board's approval or it was important enough for the Board to consider" and admitted that Commodities was discussed at Holdings' Board meetings and where the Board was advised by Galadari that Commodities was "supplying cash or supplying liquidity" to Holdings.

c) Moreover, Mr. Sami also acknowledged that if Galadari had assigned his interest in Commodities to Holdings and transferred income of Commodities in cash to Holdings it would have been entirely proper to treat Commodities as owned by or as part of Holdings in the audit of accounts. Of course, this testimony begs the question, which essentially relates to whether Galadari did in fact and in law, assign an own-

ership interest in Commodities to Holdings at or before the relevant time and whether in connection with such assignment or otherwise Holdings assumed the future liabilities of Commodities.

d) Mr. Zubair testified that although Commodities was started by Galadari as a partnership "thereafter later on when he started consolidating Group accounts and things like that, like many other assets he assigned a lot of things to Holdings, and one is the Commodities' shares".

The Committee does not accept that the testimony of Mr. Sami and Mr. Zubair, when taken as a whole, provides evidence that an assignment of Galadari's interest in Commodities to Holdings took place.

The Committee finds, having heard and considered the testimony of Mr. Zubair in its entirety, that this testimony when fully considered indicates that Mr. Zubair did not consider that Galadari had assigned his ownership interest in Commodities to Holdings, but rather that he had assigned the profits only of Commodities to Holdings. Mr. Zubair further gave evidence which the Committee accepts that the board of Holdings was totally against Holdings becoming involved in the commodity business, and that the board considered that a "commodity company should not be in the group where there is a bank in the group," and that Galadari was informed of this.

The Committee similarly does not accept that Mr. Sami's evidence confirms that an assignment of Galadari's ownership interest in Holdings took place. Mr. Sami, was from April 1982, managing director of Holdings as well as, at the same time managing director of UBME. The Committee accepts his evidence that he considered the inclusion of Commodi-

ties in the Holdings' consolidated financial statements of 31st March 1981 was a mistake or as he says a "misstatement". The Committee also accepts his evidence that the transfer of Galadari's interest in Commodities was never discussed at meetings of the board of directors of Holdings and that the only mention that he could recall of Commodities at such meetings was that Galaradi named Commodities as "supplying cash or supplying liquidity to the group."

The Committee concludes that the testimony of Mr. Sami, and Mr. Zubair does not land support to Drexel's conclusion that an assignment of Galadari's ownership interest in Commodities was made to Holdings.

There is no evidence before the Committee that Drexel, in extending credit to and conducting business with Commodities ever relied upon any express or implied representation by Holdings that Holdings either owned or controlled Commodities nor is there any evidence that Galadari on behalf of Holdings ever represented this to be the case. Mr. Van Till, an employee at the relevant time of Drexel International and one of the Drexel employees primarily responsible for the Commodities account and who was personally involved in opening the account of Commodities, testified that he believed Commodities was a partnership between Galadari personally and Mr. Bashir. The Committee finds that no such representations were given.

The Committee has also had the advantage of having before it the testimony of two accountants who were involved in the audits for Holdings and Commodities for the financial year 31st March 1982.

Mr. Vijay Malhotra testified before the Committee in Dubai. He was the second audit partner employed in the audit of Holdings at PMTH. Drexel relies on his evidence that Commodities was either

a subsidiary or division of Holdings. However, the Committee considers that little weight can be placed on the evidence as it was not based on any personal knowledge and indeed, PMTH had not, according to Mr. Malhotra, conducted an investigation into the ownership of Commodities because the amounts involved, in the opinion of the audit partners at PMTH, were not significant to the consolidated financial statements as a whole.

Mr. Hughes, the partner in charge of the audit of Commodities gave evidence before Mr. Filler. He testified that in May 1982 Galadari had confirmed to him that Commodities was a partnership between himself and Mr. Bashir, and that, at no time did he, Mr. Hughes, believe that Commodities was a part of Holdings.

The international accounting firm of Price Waterhouse reviewed the transcripts and documents presented to the Committee regarding this question. By a letter dated 21st April 1987, Price Waterhouse reported to the Committee that the accounts of Holdings at 31st March 1982 were wholly consistent with Galadari having assigned his interest in Commodities to Holdings and that the accounts "could not be interpreted in any other way." They further concluded that on the basis of all the evidence on this issue "it is difficult to see how Commodities could have been described in the accounts of Holdings other than as a division or an unincorporated division."

In a further letter to the Committee dated 19th February 1991, Price Waterhouse responded on behalf of Drexel to the Spicer & Oppenheim report dated 21st June 1990 and the subsequent cross-examination of the author of that report Mr. Holden in December 1990. In this opinion Price Waterhouse state that the evidence available "requires the conclusion

that A.W. Galadari assigned his ownership interest in Commodities to Holdings." They go on to say that "in their opinion it is not possible to reach a definitive conclusion as to the ownership of Commodities without taking legal considerations into account." Price Waterhouse are also of the opinion that the minute of 19th December 1981 of the board of Holdings, the extracts in evidence of the books and records of both Commodities and Holdings, the evidence of Mr. Malhotra of PMTH that Galadari had told Mr. Hadi, the PMTH partner in charge of the audit, that Commodities was to be included as a division, the PMTH letter of 23rd March 1982 to Mr. Botha, the finance director of Holdings stating that PMTH had been told by Mr. Dhedi that Commodities was to be included as a division, and the fact that Galadari and Mr. Sami signed the Holdings' financial statements, is all acceptable audit evidence and is more than sufficient to support the inclusion of Commodities in the financial statements of Holdings at 31st March 1982.

Mr. Jackson the partner at Price Waterhouse who wrote the opinion has also given an interview before Mr. Filler, which we have also considered. He testified that, in his opinion the reference in audited financial statements that a company owns another company is not conclusive evidence and that other documentation should be looked at to establish legal ownership.

Spicer & Oppenheim were instructed by the Committee to provide an independent accountants report on the evidence available. This report is dated 21st June 1990 and the author of the report, Mr. Holden was cross-examined by counsel to Drexel in December 1990. Spicer & Oppenheim concluded that purely from an accounting point of view there was "no justification for the inclusion of Commodities

in the 1982 Holdings' consolidated accounts." They further concluded that "on the available evidence, it is more probable than not that Commodities was an independent private enterprise which was dealt with incorrectly in the preparation of consolidated financial statements for Holdings as at 31st March 1982. These conclusions were based largely on Spicer & Oppenheim's findings that "there was confusion over Commodities' status which PMTH did not satisfactorily explore" and that "there is no documentary evidence of any work done in establishing the background to the treatment adopted despite the unusual circumstances of the confirmation received during the previous year's audit." This was a reference to a telex dated April 15th 1981 from Holdings to Commodities asking that Commodities confirm direct to PMTH "our equity investment in A.W. Galadari Commodities as on 31st March 1981," which was replied to on the same day from Commodities to PMTH in the following terms: "We confirm that A.W. Galadari Holdings does not have any equity investment in A.W. Galadari Commodities."

The Committee concludes from the expert accounting reports together with the corroborating evidence of Mr. Malhotra that PMTH did not satisfy themselves that a change in ownership of Commodities had taken place, before including Commodities in the consolidated financial statements of Holdings on an equity accounting basis. Therefore the audited financial statements of Holdings as at 31st March 1982 cannot be accepted as conclusive evidence that an assignment of Galadari's interest in Commodities to Holdings actually took place. The Committee further agrees with Price Waterhouse that the failure of PMTH to so satisfy themselves is not conclusive of whether Galadari assigned his ownership interest in Commodities to Holdings as a matter of fact.

The Committee also has before it the opinion of Mr. Filler on the Commodities/Holdings issue. This opinion is not binding on the Committee and Mr. Filler was not instructed to render any opinion on this aspect of the case. However, the Committee has considered the evidence Mr. Filler obtained on this issue, in reaching their conclusions. The Committee has not found Mr. Filler's analysis of the issue and conclusion to be persuasive, relying as it does on the assumption that an assignment of Commodities to Holdings must have taken place because of the inclusion of Commodities in the Holdings' financial statements without examining whether such an assignment did, in fact, take place.

The Dubai firm of advocates and legal consultants A.R. Hilal & Associates at the Committee's request have advised the Committee by letters dated 13th April 1987, 17th September 1987 and 17th January 1988 regarding certain general principles of the law and practice of Dubai and other Arab countries. Mr. Salih of that firm also testified before Mr. Filler. A.R. Hilal & Associates have stated that the commercial law in Dubai does not directly specify the requirements of an assignment and in these circumstances that the law of other Arab countries to which Dubai Courts may look in determining relevant principles provide specific guidance in this matter. The Law of Contracts of such countries including that of Egypt, Syria, Libya, Iraq and Lebanon recognize the concept of assignment of a right which requires among other things an agreement between the assignor and the assignee and the existence of consideration of such assignment. In addition the law of these Arab countries provide special procedures regarding the transfer of shares and equities of companies. Such transfers must be in writing and registered in the appropriate registers and before the appropriate authorities.

The Committee notes that in Dubai, in 1982, transfers of businesses from one entity to another had to be registered with the Dubai Municipality and that in such circumstances it was necessary to obtain a new trade licence showing that change of onwership. However, new licences were only issued after publication of the proposed change in the local Dubai press inviting objections to such changes. There is no evidence before us that any change of ownership was registered or even applied for and in fact a new trade licence was issued for Commodities on 14th June 1982 still naming Galadari as the licencee.

A.R. Hilal & Associates have stated that the Shari'a recognises the concept of a gratuitous assignment or "Hiba". They indicate that in order to be valid under the Law of the Shari'a the Hiba must be in writing and attested by two witnesses. This aspect of Hiba is also supported by the Holy Curan. Furthermore, a Hiba is not final or definite but revocable at any time.

A.R. Hilal & Associates also advised us regarding the legal significance of trade licenses in determining ownership of licensed businesses under Dubai Law and practice. They have indicated that trade licenses are given considerable weight in determining ownership under Dubai Law and while the Dubai Shari'a Court may admit extrinsic evidence to the contrary in determining that question the Dubai Civil Court is "inclined to rule that trade licenses are official documents and oral evidence should not be allowed to contradict such documents."

Samir Saleh & Associates has rendered an opinion to the Committee at the request of Drexel dated 15th December 1987, in response to that of A.R. Hilal & Associates and two further opinions have been given in the course of 1988. They indicated that whether or not there was a formal legal "assign-

ment" of Galadari's ownership of interest in Commodities to Holdings there was a "defacto assignment". In this connection they stated "any purported challenge to this transaction based on the way in which the transfer was made (e.g. the lack of statutory authority in Dubai and other legal considerations) will not alter the reality of the transaction in three main respects:

- the nonexistence of Commodities as a corporate body;
- the actual transfer of funds;
- and the treatment of Commodities as a division of Holdings by the Holdings' Board.

Furthermore, in regard to the lack of direct statutory authority in Dubai recognising assignments, Samir Saleh & Associates contended: "the lack of statutory authority for assignments is not really the crucial question, rather that there is no statutory regulatory or judicial authority prohibiting assignments and that there is in fact daily practice of transfer of assignment of interest from one person to another in Dubai which cannot be challenged on the basis of scriptual sources."

While agreeing that "in strict Shari'a the concept of assignment of rights is not recognized and that in Shari'a transactions the parties, mainly in civil transactions, resort to transfer of debts or "Hawala", Samir Saleh & Associates asserted that "the business pressure in commercial transactions in Dubai, leaves the parties not to rely on Shari'a terms which are not contained in the scriptual sources of the Holy Quran and Hadith (the Prophet's practice)."

Finally, Samir Saleh & Associates indicated that the laws of Lebanon, Kuwait and Bahrain recognise the concept of assignment of a business. He emphasised however that it is the concept of assignment

of a business which is relevant here (as a corollary of the intermingling of assets of Commodities, a Division of Holdings, with Holdings' assets and not a specific and different administrative requirements in each country covering assignment by a written deed, a registration, publicity, etc.) which are obviously not applicable in Dubai since there is no statute law on the point."

Faced with these conflicting opinion, the Committee has preferred that of A.R. Hilal & Associates, they being lawyers practising in Dubai to that of Samir Saleh & Associates who do not practice law in Dubai and have based their opinion, at least to some extent, on information they have obtained from unnamed practitioners who, they say, have practised for a number of years in Dubai.

Evidence of the English law of assignment was also put before the Committee in the form of opinions from English lawyers, Messrs Freshfields and Simmons & Simmons. However, both A.R. Hilal & Associates and Samir Saleh & Associates did not consider it necessary in determining the issue of assignment to look to English law and therefore the Committee does not consider this evidence to be relevant to the issue of whether there was an assignment which was valid under Dubai law.

Drexel have argued that based on the documentary evidence that Commodities was a division of Holdings during the relevant period, it must be inferred that Holdings' ownership of Commodities was accomplished by a transfer of the Commodities business to Holdings and that the burden of proof is not on Drexel to show how Commodities became a division of Holdings. However, given the contradictory evidence before them, the Committee is of the opinion that Drexel does carry that burden. It is for Drexel to show that an assignment legally valid

under the law of Dubai of Galadari's ownership interest in Commodities to Holdings did take place betwene Galadari and Holdings. There is no evidence before the Committee either oral or documentary of any actual assignment. Certainly there is no evidence of an assignment legally enforceable under the law of Dubai. This would require a written agreement supported by consideration. There is no evidence of any such written agreement nor is there any evidence in the books of Holdings or elsewhere of any consideration being given for any purported assignment. Therefore Drexel have failed to discharge the burden of proving that such an assignment did actually take place.

The Committee therefore concludes upon a consideration of the record before it as a whole that Holdings is not, and never was legally responsible for any of the obligations of Commodities, including any claim by Drexel against Commodities.

4) Does Drexel hold a valid security over 6,068,640 shares of Class B stock of UBME of the Middle East Limited or the proceeds thereof?

As security for the obligations under the Promissory Note Galadari purported to pledge and turned over to Drexel International two share certificates numbered 7B and 10B representing 6,068,640 shares in UBME. The share certificates were printed in Arabic and no English translation was provided.

The face of one of the share certificates indicates that the registered owner of those shares is "Abdul Wahab Galadari Group of Companies Holdings Private Ltd." The face of the other share certificate indicates the registered owner is "Abdul Wahab Galadari Private Ltd."

On the face of each certificate there appears the legend that for the sale or assignment of the docu-

ment to any other person or establishment, to be effective, must be approved by the board of directors of UBME. This restriction however, does not preclude the pledge or deposit of the shares.

Galadari did not obtain the share certificates with the approval of the board of directors of Holdings, or was he authorised by the director of Holdings to pledge on deposit the share certificates with Drexel International.

At the time of the pledge the Central Bank of the United Arab Emirates, the federal regulator of all banking in the United Arab Emirates, had issued a directive prohibiting directors of UBME from trading or dealing in the shares of UBME. Galadari was, at the time a director of UBME and Drexel concedes that Galadari "may" have disobeyed the instructions of the Central Bank.

On 28th October 1982 Drexel International assigned the Promissory Note to Drexel and, at this time the share certificates were translated from Arabic to English.

In November 1983, a Provisional Board of Directors of UBME was appointed by the government of Dubai. Thereafter Drexel attempted to notify the Provisional Board of its security interest in the shares. However, such security interest was never registered. As part of the rehabilitation process of UBME, the government of Dubai purchased all shares in UBME previously owned by Holdings. The Decree provides that the proceeds of the shares but not the shares themselves would form part of the estate to be administered by the Committee.

There is no power in the Memorandum of Association of Holdings to enable Holdings to provide security for the existing debt of a third party.

Drexel claims to have a security interest in UBME shares, evidenced by the two certificates purportedly pledged to Drexel International by Galadari.

Article 2 of the Decree contains a definition of "Secured Debts":—

> "Secured Debts" means debts secured by Galadari Assets and/or assets owned by Galadari Companies and/or the Bank Shares. . . . as follows:-
>
> b) . . . . . if the security taken is:
>
> i) by way of a notarised mortgage document; and
>
> ii) the mortgaged assets are in the possession of the mortgagee; and
>
> iii) registered if capable of registration."

It is not disputed by Drexel that the pledge was not registered on the share register of UBME or any other register maintained by UBME for that purpose.

The Committee finds that the purported pledge of the shares was capable of registration with UBME and therefore the debt of Drexel is not secured as far as the receivership is concerned as it does not fall within the definition of "Secured Debts" in Article 2 of the Decree.

The Committee does not consider that the validity of the pledge in the receivership is governed by New York law. However, if the matter was by New York law the Committee would have accepted the analysis of the issue provided by Mr. Filler and Professor Speidel, both being U.S. lawyers who concluded that in their opinion the pledge would not be valid under New York law.

B. *Refco's Claim*

i) Was Refco's claim against Holdings timely?

Refco did not originally claim to be a creditor of Holdings. The Proof of Debt or Claim Form did not require them to.

For the reasons given above with regard to Drexel's claim, the Committee finds Refco's claim to rank as a creditor of Holdings to be timely.

ii) Should Refco's claim be admitted in whole or in part in the receivership?

The Committee has considered the Customer Agreement dated 24th March 1983 ("The Customer Agreement") between Refco and Commodities. There is some doubt as to whether this agreement is betwen Refco and Commodities or Refco and Galadari. However, it is signed by two employees of Commodities. Furthermore, ancillary documentation to this agreement is signed by Galadari apparently on behalf of Commodities.

On 6th July 1983 Galadari on behalf of himself and Commodities acknowledged a debt owing in the accounts of Commodiites with Refco, of US$ 6,109,664.20 as at that date. This balance was reduced by three payments of US$ 500,000 each on 19th September 1983, 18th October 1983 and 17th November 1983, to leave a final balance outstanding of US$ 4,609,664.20.

The Committee finds that the Customer Agreement was entered into betwen Refco and Commodities and that Commodities is liable for the debit balance outstanding in the accounts maintained under thc Customer Agreement.

The Committee has reconciled the books of Commodities with Refco's accounts. There is no evidence before the Committee that Refco in any way

acted improperly in the liquidation of the accounts of Commodities with Refco. Therefore the Committee finds for the purposes of the receivership and distribution of dividends only that Refco has a valid claim against Commodities in the receivership in the sum of US$ 4,609,664.20. The Committee further finds that Refco is entitled to interest on the reducing debit balance outstanding at the rate of interest contained in the Customer Agreement being the then current 90 day United States Treasury Bill rate from 6th July 1983 to 19th July 1984 and thereafter at a simple rate of interest of 9% per annum.

iii) Has Refco a valid claim against Holdings?

For the reasons given above in respect of Drexel's claim, the Committee finds that Holdings is not and never was legally responsible for any of the obligations of Commodities including any debts owed by Commodities to Refco.

In rendering this decision the Committee considers that all issues as between the Committee and Drexel and the Committee and Refco have been resolved and disposed of. This decision has, in pursuance of Article 12 (f) of the Decree, the effect of a judgement, and is, subject to the rights of the parties to appeal the decision to the Judicial Committee (as defined in the Decree), final and binding on the parties. In this regard the Committee notes that this decision may be appealed to the Judicial Committee within 30 days of the date of the decision.

Issued in Dubai on this Sunday, 14th day of April, 1991.

Signed:

1) Abdulla Hassan Al Rostamani

—Chairman /s/ Abdulla Hassan Rostamani

2) Abdullá Lootah

—Member /s/ Abdullá Lootah

3) Nabil Arif

—Member /s/ Nabil Arif